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No. 06-1569

FILED
JUN 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARYLAND RECLAMATION, INC.,

Petitioner,

v.

RAMBLEWOOD HOMEOWNER'S ASSOCIATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE CASE

Petitioner, here is Maryland Reclamation, Inc. (Pet. at 1). Maryland Reclamation, Inc. was not a party below and it is not a Maryland Corporation. Maryland Reclamation, LLC is sometimes referred to as the Petitioner in the present Petition (Pet. at 3) and it was the appellee below. Maryland Reclamation LLC, is a limited liability company organized under the laws of the State of Maryland. Respondents and appellants below, are Ramblewood Homeowners Association, Donald Carter, a resident at Ramblewood, and Prince George's County Council, sitting as the District Council. Ramblewood Homeowners Association is a corporation organized under the laws of the State of Maryland.

DISCLOSURE

Pursuant to this Court's Rule 29.6, Ramblewood Homeowners Association states that it has no parent company and that no publicly held company owns more than 10% of Ramblewood's stock.

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OPINIONS BELOW

In addition to the opinions listed by Petitioner (Pet. 2) the District Council of Prince George's County signed a final order on September 22, 2003, which was entered on September 25, 2003 (September 22, 2003 order), that denied Petitioner's Application for a Rubble Fill. This order contained the findings of Fact and Conclusions of Law relied on by the District Council. A copy of this order appears at appendix A to this Brief. On November 18, 2004 the District Council filed a Supplemental Order of Denial incorporating the September 22, 2003 order and addressing the necessity issue after remand from the Circuit Court and a copy of this Supplemental Order appears at appendix B to this Brief.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(a) to review Maryland's Court of Appeals denial of Petitioner's Motion For Reconsideration of Denial Of Petition For Writ of Certiorari (Motion For Reconsideration). However, in the circumstances of this case 28 U.S.C. § 1257(a) cannot be used to invoke jurisdiction.

STATEMENT OF THE CASE

1. The Facts

This case concerns Petitioner's application for a special exception for a rubble fill that was filed in Prince George's County Maryland (county). The proposed site is

divided into two parcels which together total 131.5 acres and these sites are separated by the county access road to the sanitary landfill. Pet. App. 4a. The largest of the two parcels borders on Brown Station Road and it is 88.59 acres. Id. The eastern parcel is the smaller of the two at 42.91 acres and it borders the Ramblewood and Oak Grove Communities. Id. Both parcels are extraordinarily close to the neighborhood homes. Pet. App. 4a-5a. On the western side, the proposed site is within 100 to 150 feet of the homes in Robshire Acres. Id. There are over 600 families in the Robshire, Ramblewood and Oak Grove communities. Pet. App. 3a. The 600 families have been suffering for decades from the direct impact of a nearby sanitary landfill; the Ritchie Reclamation Rubble Fill (Ritchie), which is less than one and a half miles from the proposed rubble fill; and an electric substation. Pet. App. 3a, 16a-19a. One reason for the District Council's denial of Petitioner's application and the sole reason for Maryland's Court of Special Appeals affirmance of that denial was the substantial evidence in the record of these cumulative adverse impacts. Pet. App. 11a.

2. Proceedings Before The Administrative Agency

Hearings on Petitioner's Application were initially held by the Office of the Zoning Hearing Examiner. After thirteen (13) evidentiary hearings, the Zoning Hearing Examiner (ZHE), on March 29, 2002, denied Petitioner's application for the smaller parcel and granted it for the larger parcel. Pet. App. 6a. Except in the case of remand from the District Council back to ZHE, no new evidence not already in the record is allowed to be introduced once the case is appealed to the District Council pursuant to section 27-131(f) of the county code. Both Petitioner and

Respondents, Ramblewood Homeowners Association and Donald Carter (Respondent),[1] on April 29, 2002, appealed to the District Council by filing written exceptions specifying the portions of the record below they relied on for claiming error pursuant to section 27-131(a) and (b) of the county code and requesting oral argument. The District Council remanded the case for further hearings on the necessity issue in June of 2002. Additional evidence on that issue only was taken and on May 3, 2003 ZHE issued its final decision. Both parties, in May of 2003, again filed written exceptions, and oral argument on all issues in the case took place on September 22, 2003. The District Council signed an Order dated September 22, 2003 that denied Appellee's application on both cumulative adverse impact grounds and a failure to prove necessity. App. 1a; Pet. App. 6a.

3. Proceedings Before The Circuit Court For Prince George's County

Petitioner, appealed the Council's denial of the special exception to the Circuit Court of Prince George's County in case number CAL-03-22303. The Circuit Court appeal was heard in two separate judicial review hearings. The first hearing was held on July 16, 2004 and resulted in a subsequent order of remand for the purpose of having the county council explain the meaning and application of the "necessary to serve the projected growth" requirement in 27-406(h) of the county zoning ordinance. Pet. App. 28a.

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[1] The term Respondent in this Brief refers to both Ramblewood Homeowners Association and Donald Carter. The Prince George's County Council sitting as the District Council will file a separate opposition brief to the Petition.

The Council, on November 8, 2004, issued a supplemental order readopting its earlier order. App. 12a.

A second hearing was held in the Circuit Court on April 29, 2005 and on May 3, 2005, Judge Lombardi issued another remand order finding that the Council's interpretation of 27-406(h) was an error of law and once again remanded the case to the District Council on both necessity and adverse effects grounds. Pet. App. 4a.

4. Proceedings Before Maryland's Court Of Special Appeals

Respondents filed Appeals to Maryland's Court of Special Appeals. Pet. App. 3a. The constitutional grounds claimed here were not raised by Petitioner before the Court of Special Appeals. Id. Maryland's intermediate appellate court in an unreported opinion affirmed Prince George's County Council's decision to deny the application solely on the basis of state law. Pet. App. 11a.

5. Proceedings Before Maryland's Court Of Appeals

Petitioner filed for a writ of certiorari in the Court of Appeals but it did not raise either of the constitutional issues that it asks this Court to review here. The Maryland Court exercised its discretion and denied the petition on October 18, 2006. Pet. App. 1a. Once its petition for certiorari was denied Petitioner filed a Motion To Reconsider in which Petitioner for the first time raised its due process argument based on the District Council's alleged failure to provide oral argument. However, again Petitioner failed to raise its commerce clause argument. The Motion was denied. Pet. App. 2a.

REASONS FOR DENYING THE PETITION

I. THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1257(a)

A. The Highest State Court To Render A Judgment In The Present Case Was Maryland's Intermediate Appellate Court Not Maryland's Court Of Appeals.

Petitioner, requests that a writ of certiorari issue for the review of the Maryland Court of Appeals Order denying Petitioner's Motion For Reconsideration issued on December 15, 2006. Pet. at 1, 2, 7 and Pet. App. 2a. Such a writ cannot issue since the only reviewable decision below pursuant to 28 U.S.C. § 1257 was the decision of Maryland's intermediate appellate court.

Under Maryland law writs of certiorari filed in Maryland's highest court are granted or denied in the exercise of the sound discretion of Maryland's Court of Appeals. *Waltson v. Sun Cab Company, Inc.*, 267 Md. 559, 564-566, 298 A.2d 391, 395 (1973). Appeals of right in cases such as the present one are to the Court of Special Appeals of Maryland. Id.

As this Court stated in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

> "The Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the Court of Civil Appeals 28 U.S.C. § 1257(a)."

Similarly, this Court held in *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) that:

> "A preliminary objection is urged that the present writ of certiorari was addressed to the Court

> of Appeal and not to the Supreme Court. But under the Constitution of the State the jurisdiction of the Supreme Court is discretionary. . . . when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had. . . ."

Id. More recently, in *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 500 (2001) this Court granted certiorari to review the judgment of Maryland's intermediate appellate court as the final judgment rendered in a case in which Maryland's highest court declined to exercise discretionary review. Id. Thus, in the present case, when Maryland's highest court exercised its discretion and denied Petitioner's petition for certiorari, the judgment of Maryland's intermediate appellate court became the final judgment rendered by the highest court in Maryland and it is only this judgment that is reviewable by this Court pursuant to 28 U.S.C. § 1257(a).

B. Adequate State Grounds For the Decision Below

Maryland's Court of Special Appeals affirmed Prince George's County Council's decision to deny the application solely on the basis of state law:

> "We shall hold that there were sufficient findings of fact with respect to disproportionately adverse effects, and that there were substantial evidence to support those findings."

Pet. App. 11a.

The Court of Special Appeals explained that the burden of proof on this issue can be met under state law through the concept of cumulative adverse impacts.

> "This burden of proof can be met with evidence that the proposed rubble fill site will impose inherently adverse effects on neighboring residences, with greater intensity, frequency, and duration, because there are already other similar uses near the proposed site. Four cases illustrate the boundaries of the "cumulative effects" rationale for denying a special exception to operate a rubble fill."

Pet. App. 13a.

The Court further explained that two currently operating landfills within close proximity of one another subjects the surrounding residential community to cumulative adverse impacts as does the closing of one landfill operation and the immediate opening of another in the same location so that the neighboring residential properties suffer the effects of a landfill operation for a total of 22 years. Pet. App. 15a. The Court of Special Appeals then found that there were sufficient findings of fact with respect to disproportionate adverse impacts and there was substantial evidence in the record to support those findings. Pet. App. 16a-17a.

In making its ruling the Court of Special Appeals also applied state law standards for the review of an administrative agency decision and stated:

> "In reviewing 'the decision of an administrative agency, "we reevaluate the decision of the agency, not the decision of the lower court." The scope of our review of administrative agency action is narrow and we are "not to substitute (our) judgment for the expertise of those persons who constitute the administrative agency." Accordingly, this Court is tasked with' "determining if there is substantial evidence in the record as a whole to

> support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. . . ." *Days Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. 469, 484-85, cert. denied, 372 Md. 431 (2002) (citations omitted)."

Pet. App. 11a.

As this Court said in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945):

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. . . ." (Citations omitted).

Id.

Thus there is no doubt that the Court of Special Appeals decision rests only on state grounds and that this Court does not have jurisdiction under 28 U.S.C. § 1257 to hear this case.

C. Petitioner Has Failed To Meet Its Burden Of Showing That The Federal Questions Were Either Addressed By Or Properly Considered By The State Court That Rendered The Decision To Be Reviewed

This Court has repeatedly stated that a petitioner must meet the burden of showing that the federal questions were addressed by or properly presented to the state Court that rendered the reviewable decision. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *Webb v. Webb*, 451 U.S. 493, 495 (1981). Where the state court does not address the federal question there is a presumption that the constitutional issues were not properly raised:

> "This Court has frequently stated that when the highest state court has failed to pass on a federal questions, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." (Citation omitted).

Id. *Webb v. Webb*, 451 U.S. at 495.

Moreover, to meet its jurisdictional burden and rebut the presumption, Petitioner must at least comply with the prerequisites of Supreme Court Rule 14.1(g)(i). As the Court said of former Rule 21.1(h) the predecessor of Rule 14.1(g)(i):

> "Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which she now seeks to

> have this Court enforce. 28 U.S.C. § 1257(3). Similarly our Rule 21.1(h) *requires* the petitioner to 'specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court.'" (Emphasis added).

Id. *Webb v. Webb*, 451 U.S. at 495.

The petition, in the present case, simply does not specify the stage of the proceedings when the federal questions sought to be reviewed were raised in the first instance and in the appellate courts. The petition does not state the method or manner that the federal questions were raised before the Prince George's County District Council or any of the Appellate Courts. The petition does not state the way in which the federal questions were passed on by the District Council or the Maryland Courts and the petition does not contain any pertinent quotations of specific portions of the record where the federal questions appear so as to show that this Court has jurisdiction to review the judgment on a writ of certiorari.

Thus Petitioner has failed to meet its burden of affirmatively establishing that it properly raised the federal questions below and the result of such a failure to meet its burden should be a denial of its Petition. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *Webb v. Webb*, 451 U.S. 493, 495 (1981).

D. Petitioner Failed To Follow Maryland Procedures For Securing Review In State Court Of Its Alleged Federal Questions.

Here, in its zeal to obtain review Petitioner neglects to tell this court that it failed to address in its petition for writ of certiorari to Maryland's highest court either of the alleged constitutional issues that it now seeks this Court to review. Moreover, Petitioner fails to tell this Court that it did not argue either constitutional issue in its Brief To Maryland's Court of Special Appeals. In fact, Petitioner in its Motion For Reconsideration to Maryland's highest court for the first time raised its denial of oral argument as a due process issue, but even then petitioner failed to raise the commerce clause issue.

The scope of Appellate review in Maryland is governed by Rule 8-131. Subsection (b) of 8-131 states:

> "(1) Prior Appellate Decision. – Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals."

As a general rule Maryland's highest court has held that where a Petitioner does not raise an issue in its request for writ of certiorari, it lacks jurisdiction to review the matter. *Allied Investment Corp. v. Jasen*, 354 Md. 547, 568, 731 A.2d 957, 968 (1999); *Lerman v. Heeman*, 347 Md. 439, 450-451, 701 A.2d 426, 432 (1997).

Maryland's decision in *Solberg v. Majerle*, 388 Md. 281, 292-293, 879 A.2d 1015, 1021-1022 (2005) is especially instructive on Maryland appellate procedure for the present case. In that case the Respondent, without raising the issue in a petition for certiorari or cross-petition for certiorari, asked Maryland's highest court to address the issue of whether the use of a de novo standard of review on appeal, where the statue only provided for a review on the record, divested the lower court of subject matter jurisdiction. Id. Maryland's highest court determined that it did not, pointing out the difference between cases where a court lacks the power to hear a class of cases, i.e. subject matter jurisdiction, and inappropriate exercises of jurisdiction due to a court's violation of statutory restrictions on a court's authority such as applying de novo standards of appeal when a statute requires appeals to be heard on the record. Id. *Solberg*, 388 Md. at 294, 879 A.2d at 1022. Issues involving an "inappropriate exercise of jurisdiction" must be raised in a petition for certiorari and Maryland's highest Court said:

> (1) Although neither Majerle nor the landlord filed a cross-petition for certiorari, Majerle argues in its brief that the Circuit Court lacked jurisdiction to hear the tenants' appeal de novo. Ordinarily, we would not address an issue not raised in a petition for certiorari, but a jurisdictional defect may be noticed on our own initiative. The simple answer to the argument is that there was no lack of jurisdiction in the Circuit Court, and, in the absence of the issue being raised in a petition for certiorari, or added by us on our own initiative, the matter is not properly before us.

Id. *Solberg*, 388 Md. at 292-293, 879 A.2d at 1021-1022.

Thus in the present case, under Maryland law, Petitioner was required to raise its alleged constitutional issues in its petition for certiorari to Maryland's Court of Appeals.

As this Court has held a failure to comply with state procedures in raising issues is a fatal flaw to the jurisdiction of this Court.

> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. . . . When as here there can be no pretense the (state) Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision whether right or wrong." (Citations omitted).

Wolfe v. State of North Carolina, 364 U.S. 177, 195 (1960).

Here, Appellant did not raise either of its constitutional arguments in its state court petition for certiorari and it only raised its due process argument in its Motion For Reconsideration. Thus Petitioner failed to follow Maryland procedural appellate practice and its Petition should be denied. Id. As this court said in *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945),

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case

could have been brought here had the questions been raised prior to the original disposition."

Id.

II. THERE IS NO MERIT IN PETITIONER'S DUE PROCESS ARGUMENT

Petitioner's due process question is whether:

> " . . . The District Council violated Petitioner's due process rights guaranteed them in the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights when the District Council decided that petitioner's proposed rubble fill would cause adverse effects greater than would be anticipated at other locations in the Rural Residential Zone prior to hearing evidence in oral argument."

Pet. at 11.

To support this argument, Petitioner cites an isolated sub-section of the Prince George's County Code and an isolated sentence in The District Council's interlocutory remand order. Pet. at 12. Then Petitioner rambles through a series of irrelevant quotes from cases, legal encyclopedia's, and treatises about de novo hearings (Pet. 12-15) and concludes that the District Council made a "decision concerning alleged cumulative adverse effects" without considering evidence introduced at a hearing on the record. Pet. at 15. Once the facts and sections of the Prince George's County Code omitted by Petitioner are properly identified, Petitioner's alleged due process claim evaporates because there simply was no final decision by the District Council on the merits of this case prior to oral

argument. Moreover, as the following illustrates, there is no new evidence introduced to the District Council. The appeal is based on evidence already in the record.

The following excerpts from subsections of the Prince George's County Code are relevant to the argument below and thus for the Court's convenience Respondent sets them out here.

> **Sec. 27-126. Office of the Zoning Hearing Examiner.**
>
> (a) The District Council shall establish the office of the Zoning Hearing Examiner and shall appoint one (1) or more Hearing Examiners to conduct public hearings in zoning cases listed in this Subdivision.
>
> **Sec. 27-127. Powers and duties to conduct hearings.**
>
> (a) The Zoning Hearing Examiner shall conduct hearings for the following categories of zoning cases:
>
> 2. Applications for special exceptions under Part 4, including applications for variances in conjunction with the Special Exceptions;
>
> **Sec. 27-129. Hearing Procedures**
>
> **(k) Case taken under advisement.**
>
> (1) Once a case has been fully presented, it shall be taken under advisement for the Examiner to render a decision. Thereafter, no new evidence may be entered into the record except:
>
> (A) If good cause is shown why the evidence was not previously presented into the record; or

(B) The evidence is presented pursuant to a remand of the District Council

Sec. 27-131. Oral argument and appeals from Zoning Hearing Examiner's decision.

(a) **Authorization.**

(1) With the exception of zoning cases for which an alternative appeal process is otherwise specified, any person of record or the People's Zoning counsel may file with the District Council, within thirty (30) days after the Zoning Hearing Examiner files his written decision in a zoning case:

(A) An appeal from the Zoning Hearing Examiner's decision in a special exception case finally decided by the Zoning Hearing Examiner;

(B) Exceptions to the Zoning Hearing Examiner's decision in any other zoning case; or

(C) A request for oral argument before the District Council on either (A) or (B), above.

(b) **Form and content of request.**

(1) Exceptions, appeals, and request for oral argument shall be submitted (in writing) to the Clerk of the District Council. A copy shall be sent by the submitter to all persons of record (by regular mail), and a certificate of service shall accompany the submission to the Clerk.

(2) Exceptions, appeals, and requests for oral argument shall be numbered in sequence and shall specify the error which is claimed to have been committed by the Examiner. Those portions of the record relied upon to support the claim shall be specified.

(f) **New Evidence.**

(1) Persons of record may not introduce evidence not already in the record. The Council may, however, either upon written request by a person of record or upon its own motion, remand a case to the Zoning Hearing Examiner for the purpose of reopening the record to receive and evaluate additional evidence. (See Section 27-133.) In addition, the Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision.

Sec. 27-133. Remand.

(a) **In general.**

(1) Within the time specified for final decision, the District Council may remand any zoning case heard by the Zoning Hearing Examiner back to the Examiner for clarification or for additional testimony. The Council may also remand any Zoning Map Amendment of Special Exception for a de novo proceeding where there is good cause. Where additional testimony is taken upon remand, there shall be a new or revised decision from the Office of Zoning Hearing Examiner, which shall be subject to Section 27-131.

(d) **Time for final decision.**

(1) Whenever the District Council remands an application, the time limits on final action shall begin to run anew from the date of refiling the application with the District Council in accordance with the provisions of Section 27-132(d).

Sec. 27-135. Reconsideration and amendment of decisions.

(a) Reconsiderations and site plan amendments for Special Exceptions shall be as provided for in Part 4.

Sec. 27-327. Reconsideration of final decision.

(a) Once a final decision on a Special Exception application has been made, the decision may be reconsidered upon request filed by either the applicant or other person of record within (30) days of the final decision, if, based on the written request, whomever made the final decision (the Zoning Hearing Examiner or District Council) finds that there may have been an error in reaching the final decision that was caused by fraud, surprise, mistake, or inadvertence.

The Zoning Statute for Prince George's County Maryland is contained in subtitle 27 et seq. of the Prince George's County Code. Section 27-126 of the county code establishes the Office of the Zoning Hearing Examiner (ZHE) which pursuant to section 27-127, conducts hearings on applications for special exceptions for rubble fill landfills. Once the case is fully presented to the ZHE it is taken under advisement pursuant to section 27-129(k), and a final decision is rendered.

Section 27-131 allows administrative appeals to be taken from the ZHE's decision in the form of exceptions, and requests for oral argument can be made. The requests for exceptions, pursuant to Section 27-131(b), must be in writing specifying the error and the portions of the record before the ZHE that are relied on. Pursuant to sections 11-131(f) and 27-129(k) no new evidence is admitted, and only

evidence already in the record below can be introduced to the Council unless there is a remand back to ZHE, pursuant to Section 27-133(a). Where additional testimony is taken because of a remand, the ZHE enters a new or revised decision and pursuant to 27-133(a) and (d) the appeal process contained in 27-131, then begins anew. The Council then holds oral arguments and renders its decision in the form of an order along with findings and conclusions that support the denial or approval within the time limits contained in 27-132(d). The written decision of the Council, including its findings and conclusions, are then served upon all person of record. At this point the Applicant can file a Motion For Reconsideration pursuant to Sections 27-135 and 27-327 if the applicant believes that "error was caused by fraud, surprise, mistake or inadvertence."

The above process was followed in the present case. Evidence was placed into the record before the ZHE during 11 days of hearings. On March 29, 2002 the ZHE issued her decision denying the application as to the smaller parcel and granting it as to the larger parcel. On April 29, 2002 both parties filed an appeal by way of written exceptions detailing the evidence from the record they relied on and requesting oral arguments. Before oral arguments took place the District Council, Pursuant to section 27-133 of the county code, remanded the case to hear additional evidence on the issue of necessity. The ZHE held two additional days of testimony on the necessity issue and issued a new opinion pursuant to section 27-133(a) on May 1, 2003. This new opinion contained the same conclusions as ZHE's 2002 decision except that it included findings on the issue of necessity. Both parties again filed exceptions pursuant to section 27-131 and as

Petitioner admits a full hearing on all the issues in the case was held on September 22, 2003. Pet. at 5. The District Council's final order denying the application was filed with detailed explanations of its conclusions and findings. App. 1a. It was this final order signed on September 22, 2003 that was appealed to the Circuit Court by Petitioner. Pet. 5-6.

Thus what Petitioner doesn't tell the Court is that the June 22, 2002 remand order that it complained of was merely interlocutory in nature and that once ZHE issued its final opinion in May of 2003 there was a full opportunity for Petitioner to renew its appeal and argue any evidence from the record that it wished at the September 2003 hearing. In fact, that is exactly what Petitioner did. Moreover, Petitioner did not ask the District Council to reconsider its final order pursuant to Section 27-327 for "fraud, surprise, mistake, or inadvertence" and it was not until Maryland's Court of Appeals denied its petition for certiorari that Petitioner first argued that its due process rights were violated by the District Council's alleged failure to give Petitioner a hearing before deciding the case.

Petitioner's citation to Maryland cases that construed different county statutes has no bearing on the process in Prince George's County and at best its argument is disingenuous. The Prince George's County process provides for a review of evidence submitted during hearings before ZHE. There is no new evidence taken. The parties file written exceptions citing to the evidence they rely on and they can argue evidence already in the record at oral argument. This is exactly what was done in the present case.

Not only did the District Council follow the procedures set out in the Prince George's County Code, but there is also no doubt that the decision in the present case was correct. As the Court of Special Appeals said:

> "Maryland Reclamation itself actually provides some of best evidence that the proposed rubble fill will create uniquely adverse effects for it neighbors in Robshire Acres, Ramblewood, and Oak Grove. Admitting these effects, Maryland Reclamation justified them on a "containment" theory."

Pet. App. 18a.

III. THERE IS NO MERIT TO PETITIONER'S COMMERCE CLAUSE ARGUMENT

As discussed infra, Petitioner failed to raise its commerce clause argument before either Maryland's Court of Special Appeals or Maryland's Court of Appeals and this Court does not have jurisdiction to decide this issue. However, if this Court were to consider the commerce clause issue it would find there is no merit in Petitioner's argument.

Petitioner argues that Sections 27-406(g) and (h) of the Prince George's County Code unconstitutionally infringes on interstate commerce. According to Petitioner, these sections are unconstitutional because:

> "Specifically, 27-406 requires approval of a rubble fill application only upon a showing that there exists an actual deficit of rubble capacity needed for Prince George's County Rubble."

Pet. at 11.

In order to make its argument Petitioner attempts to extract isolated language from this Court's decision in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387-390 (1994). There the Court analyzed a statute that "required all nonhazardous solid waste within the town to be deposited at the Route 303 Transfer Station." Id. A "tipping fee" had to be paid for trash that was handled by the transfer station. Id. Carbone operated a local recycling center in Clarkstown and then shipped the trash out of state. Id.

By requiring Carbone to send the local waste to the Transfer Center at an additional cost, the ordinance drove up the cost for out-of-state interests that disposed of Carbone's solid waste. Id. In addition, because all local non-recyclable waste had to go to a single designated facility, the ordinance deprived out-of-state businesses the chance to compete for local business. Id. Thus, *C&A Carbone* involved a local statute that attempted to prevent local trash from entering the market place unless it was locally processed by a designated facility.

In equating the Prince George's County Statute to the statute in *C&A Carbone* Petitioner argues that conditioning special exceptions on a showing of local need is a per se violation of the Commerce Clause because the conditions imposed by the zoning ordinance deprive individuals in Washington, D.C., Northern Virginia and other Counties in Maryland of "available rubble fill capacity." Pet. at 8.

This, of course, is untrue. There are no limitations on who can use Prince George's rubble fills. Rubble can be shipped from anywhere within or without the county into a Prince George's rubble fill. Moreover, 27-406(g) and (h) allow for more rubble fills once a need for more space is shown.

The point that Petitioner misses is that its arguments, if accepted, would render all zoning statutes constitutionally deficient. The purpose of every zoning statute is to provide orderly growth based on *local needs* and conditions and the Prince George's Statute is no different.

For example, designating a zone as agricultural or Rural Residential based on county needs limits land development and deprives entrepreneurs from Washington, D.C., Virginia and other counties of "available capacity" for commercial uses, but such zoning does not violate the commerce clause. Likewise limiting the number of gas stations or liquor stores in a zone based on a showing of local need is an acceptable zoning tool that effects the "available capacity" for such uses. Thus, there is no merit to Applicant's commerce clause arguments.

IV. MARYLAND RECLAMATION, INC. IS NOT A PARTY TO THIS CASE.

The Petitioner identified in the caption of the present case and at page 1 of the Petition is "Maryland Reclamation, Inc." However, it was Maryland Reclamation, LLC that filed the petition for certiorari and Motion To Reconsider in Maryland's highest court. Pet. App. 1a-2a. It was also Maryland Reclamation, LLC that participated before the lower courts. Pet. App. 3a, 23a, and 28a. Under Maryland law a limited liability company means " . . . a permitted form of unincorporated business organization". MD. CORPS. & ASS'NS CODE ANN. § 14-101(l). Thus Maryland Reclamation, Inc. cannot bring this Petition.

CONCLUSION

For all of the above reasons Respondent respectfully asks this Court to deny the petition for certiorari.

Respectfully submitted,

KEVIN THORNTON
KAPLAN & KAPLAN, P.A.
11 E. Mt. Royal Avenue
Baltimore, MD 21202
410-752-2090
Attorney for Respondents
Ramblewood Homeowners
Association and Donald Carter

APPENDIX A

[LOGO]

THE PRINCE GEORGE'S
COUNTY GOVERNMENT

Office of the Clerk of the Council
(301) 952-3600

September 24, 2003

RE: SE 4347 Maryland Reclamation, LLC (Remand)

NOTICE OF FINAL DECISION
OF THE DISTRICT COUNCIL

Pursuant to the provisions of Section 27-134 of the Zoning Ordinance of Prince George's County, Maryland requiring notice of decision of the District Council, you will find enclosed herewith a copy of the Council Order setting forth the action taken by the District Council in this case on September 22, 2003.

CERTIFICATE OF SERVICE

This is to certify that on September 25, 2003 this notice and attached Council Order were mailed, postage prepaid, to all persons of record.

/s/ Redis C. Floyd
Redis C. Floyd
Clerk of the Council

Case No.: S.E. 4347

Applicant: Maryland Reclamation, LLC

COUNTY COUNCIL OF
PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record and consideration of argument from the parties, that Application No. S.E. 4347, for a special exception for a rubble fill on property described as approximately 131.5 acres of land in the R-R Zone, on the east side of Brown Station Road, to the north of Brown Road and approximately 2,700 feet south of White House Road, in Upper Marlboro, Maryland, is hereby:

DENIED, for the reasons stated in the findings of fact and conclusions of law attached hereto as Exhibit A, which are hereby adopted as the basis for denial of the application.

Adopted this 22nd day of September, 2003, by the following vote:

In Favor:	Council Members Shapiro, Bland, Dean, Dernoga, Exum, Harrington, Hendershot, Knotts and Peters
Opposed:	
Abstained:	
Absent:	
Vote:	9-0

COUNTY COUNCIL OF
PRINCE GEORGE'S
COUNTY, MARYLAND,
SITTING AS THE
DISTRICT COUNCIL
FOR THAT PART
OF THE MARYLAND-
WASHINGTON RE-
GIONAL DISTRICT
IN PRINCE GEORGE'S
COUNTY, MARYLAND

BY: /s/ Peter Shapiro
Peter A. Shapiro, Chair

ATTEST:

/s/ Redis C. Floyd
Redis C. Floyd
Clerk of the Council

S.E. 4347
Exhibit A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The subject property, zoned R-R, includes about 131.5 acres, on the east side of Brown Station Road, north of Brown Road and about 2,700 feet south of White House Road. The site lies just west of the Ramblewood residential community and just east, across Brown Station Road, of the Robshire Acres community. The property was farmed for many years before the 1970s, was also mined for sand and gravel, and has been used recently as a Class 3 fill. The applicant here proposes use of the property as a rubble fill, which requires a special exception in the R-R Zone.

2. The Technical Staff and Planning Board recommended approval of the special exception, with conditions. Residents in the area and their civic and homeowners associations appeared in opposition. Staff and Planning Board did not (and were not able to) determine whether the proposed rubble fill is "necessary to serve the projected growth in Prince George's County," as must be proved under § 27-406(h) of the Zoning Ordinance. At the time of their reviews the District Council had not completed action on the Ritchie Reclamation application, S.E. 4408. Moreover, staff did not – and consequently Planning Board did not – apply correctly the proof requirements in § 27-406(h).

3. The chief reasons for neighborhood opposition to the application are the anticipated adverse effects (noise, odors, and visual effects) on residences and residential areas near the site and the truck traffic (and its perceived safety and congestion problems) from the operations. The record reflects, first, that the residential communities along Brown Station Road have been visited with more than their fair and reasonable share of mining and landfill uses, "temporary" in nature, over the last 30 years or more; second, that noise, odors, and visual effects from existing and past mining, landfill, and other resource recovery and solid waste disposal activities in the neighborhood, as well as from the power lines traversing the neighborhood and the constant truck traffic along Brown Station Road, have been continuing problems for the residents for many years; and third, that neighborhood opposition witnesses showed by substantial evidence that the proposed rubble fill operations will increase for years the adverse noise, odors, visual, and traffic safety effects

now present in the neighborhood from existing landfill and other operations.

4. The main reason the District Council must deny this application is that the applicant, even with staff and Planning Board assistance, did not prove that the proposed rubble fill is "necessary" to "serve" the County's "projected growth," within the meaning of § 27-406(h) of the Zoning Ordinance.

To make these proofs, a rubble fill applicant must show what the projected County growth in the next 15 years will be, how the proposed facility will "serve" that projected growth, and how the facility is "necessary" to serve that growth. Stated another way, and perhaps oversimplified, the requirement calls for a showing of how projected County growth will be adversely affected, if the proposed rubble fill is not approved. If projected County growth will not be affected by the presence or absence of the proposed facility, then it cannot be said, for purposes of § 27-406(h), that the facility is "necessary" to serve that growth.

These requirements were not correctly stated or addressed by the applicant, the Technical Staff, or the Planning Board. They also were not correctly applied by the Examiner.

Prior Proceedings

5. Application No. S.E. 4347 has been pending since April 1999. Delays in processing were caused by staff review requirements, postponements at the request of the applicant and others, and a remand by the District Council in 2002. The main reason for the delays in this case,

however, was that many hearings were required to complete the record of testimony before the Examiner. This case, in comparison to S.E. 4408, the rubble fill case on nearby Ritchie-Marlboro Road, a case reviewed at the same time as this one, had many more witnesses and many more hearings, and there was consequently some delay before the Examiner completed the review.

The S.E. 4347 applicant may complain that it was unfair for its final decision to be made after the S.E. 4408 case decision. The two applications were in a sense in competition, as to the "necessary to serve the projected growth" issue, and this application was filed months before S.E. 4408. But no unfairness in procedure was imposed in this case, S.E. 4347. The applicant here cannot show in the record a deliberate or wrongful delay caused by staff, Examiner, Council, or parties to the proceedings. Any complaint the applicant might have about procedural delays cannot be based upon a violation of its rights under the Zoning Ordinance or the Regional District Act, Art. 28, Md. Ann. Code. Moreover, the Council at this time cannot correct prior procedural delays.

Present Application

6. Both staff and Planning Board recommended approval of the application, with conditions. These recommendations were made prior to the full merits hearing before the Examiner, and neither the Technical Staff nor the Planning Board had the benefit of a full presentation of the evidence. Only Examiner and Council had that.

Moreover, all three reviewing entities – Technical Staff, Planning Board, and Zoning Hearing Examiner – have misinterpreted and misapplied the Zoning Ordinance

standards applicable in this case. The applicant here was required to prove general compatibility with adjacent properties and neighborhood, under § 27-317 of the Zoning Ordinance, and it was also required to prove that it met the special requirements for rubble fills in § 27-406. In particular, § 27-406(h) provides:

> When approving a Special Exception for a rubble fill, the District Council shall find that the proposed use is *necessary to serve the projected growth* in Prince George's County.

(Emphasis added.) Staff, Planning Board, and Examiner required a showing only that existing rubble fill capacity in the County will run out in the next 15 years. They did not then ask for proof of adverse effects on the County's projected growth. From the proof of likely exhaustion of capacity in 15 years, staff, Board, and Examiner concluded, without evidence, that the subsection (h) standard was satisfied. But the Ordinance section requires more than that.

7. The District Council remanded this case to the Examiner for a review primarily of the issue whether the proposed Brown Station Road rubble fill would be "necessary to serve . . . projected growth," under § 27-406(h). Staff on remand did an additional analysis, the applicant produced testimony from a solid waste management expert, and the case was returned to the Council. But neither staff nor applicant adequately addressed the "necessary to serve" issue, and the Examiner also misapplied it.

Findings and Conclusions

8. The District Council concludes that neither staff nor Planning Board nor applicant, even with the testimony of solid waste management expert Robert Brickner, showed that this proposed rubble fill is "necessary to serve the projected growth in Prince George's County." The staff reviewers and the applicant, as well as the Examiner, decided that this requirement, in § 27-406(h) of the Zoning Ordinance, was met if it were proved that existing fill capacity in the County would be exhausted in a few years (less than 15) and that there were no nearby fills outside the County to receive rubble after that. But they did not relate this finding about capacity to projected growth, and without proof that growth would diminish or otherwise be adversely affected, neither applicant nor staff showed what is required under subsection (h).

9. The staff analysis, initially and on remand, projected a number of "scenarios" for rubble fill capacity in Prince George's County in the next 15 years. Each scenario depends on approval of one or more of the pending applications, including S.E. 4408 and S.E. 4347. It is agreed by the parties, and the District Council finds, that rubble fill capacity in the County will be exhausted within 10 years, unless at least one of the pending applications is approved. But that is all the "scenarios" analysis shows: the analysis does not, without more, meet the requirements of § 27-406(h).

10. As the opposition points out, fill capacity outside Prince George's County must also be considered. The Examiner received evidence of existing and operating rubble fills outside the County, in Anne Arundel, but ultimately she decided that even those fill operations

would not offer capacity to make up for in-County facilities which would be exhausted. No one made a thorough examination of rubble fills or fill capacity in the surrounding jurisdictions, the Examiner did not require one, and the record has no evidence that reductions in fill capacity will adversely affect growth.

11. Neither staff nor applicant considered what will happen when in-County and nearby rubble fills reach their capacity, in the next 10-year period. It was not shown that the absence of rubble fill capacity at existing operational sites will have any effect, good or bad, on County building or County growth. No historical data was presented, to show that growth in the past has diminished because of a lack of rubble fill capacity. No predictive analyses or models were offered, to show that growth in the future – growth of any kind, commercial or industrial or residential or otherwise – would be affected, in any way. Staff, applicant, and Examiner concluded that if and when in-County rubble fill capacity is exhausted, then (ipso facto, or by definition) growth will be affected. They did not consider, for example, that Montgomery County has no rubble fills at all, but continues to grow, or that all Maryland counties have enjoyed some growth since the 1990s, yet very few have rubble fills.

12. The Zoning Ordinance requires more proof than what the applicant offered. This applicant could not and did not prove that its proposed rubble fill – even without considering other pending rubble fill applications – is necessary to serve Prince George's County's projected growth.

13. On the "necessary to serve" issue, the District Council also notes that S.E. 4408, the Ritchie Reclamation

ruble fill application in the neighborhood just to the west of the Brown Station Road neighborhood, was recently approved. When the applicant there obtains the necessary State permit approvals, then the S.E. 4408 rubble fill will add sufficient capacity to provide in-County facilities, to "serve" projected County growth, until about 2015 or 2016.

14. The District Council further concludes, as argued by opposition residents, particularly those in the Ramblewood and Robshire Acres communities, that the applicant did not prove, as is required by § 27-317 of the Zoning Ordinance, that the proposed rubble fill at this location will not cause adverse effects greater than would be anticipated at other locations in the R-R Zone. This proposed S.E. 4347 site is much closer to established residential subdivisions than other R-R sites, including the S.E. 4408 site recently approved by the District Council. Visual, noise, and odor effects from a rubble fill at the subject location will be much greater than would be anticipated at the S.E. 4408 property and other R-R zone locations. This proof in the record offers an additional reason to deny the application.

15. Because the applicant did not prove that its proposed rubble fill facility is "necessary to serve the projected growth in Prince George's County," § 27-406(h), and because the applicant did not show that anticipated adverse traffic, noise, odor, and visual effects at this location will be no worse than they would be at other R-R locations in the County, § 27-317, the application must be denied.

APPENDIX B

[LOGO]

THE PRINCE GEORGE'S
COUNTY GOVERNMENT

Office of the Clerk of the Council
(301) 952-3600

CORRECTED COVER SHEET

November 18, 2004

RE: SE 4347 Maryland Reclamation, LLC (Remand)

NOTICE OF FINAL DECISION
OF THE DISTRICT COUNCIL

Pursuant to the provisions of Section 27-134 of the Zoning Ordinance of Prince George's County, Maryland requiring notice of decision of the District Council, you will find enclosed herewith a copy of the Council Order setting forth the action taken by the District Council in this case on November 8, 2004.

CERTIFICATE OF SERVICE

This is to certify that on November 18, 2004 this notice and attached Council Order were mailed, postage prepaid, to all persons of record.

/s/ Redis C. Floyd
Redis C. Floyd
Clerk of the Council

Case No.: S.E. 4347

Applicant: Maryland Reclamation, LLC

COUNTY COUNCIL OF
PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ORDER SUPPLEMENTING ORDER OF DENIAL

IT IS HEREBY ORDERED, after remand of this case from the Circuit Court for Prince George's County and consideration of additional argument from the parties, that, for the proposed rubble fill on property described as approximately 131.5 acres of land in the R-R Zone in Upper Marlboro, on the east side of Brown Station Road, north of Brown Road and approximately 2,700 feet south of White House Road, the supplemental conclusions attached as Exhibit A are hereby ADOPTED; and it is

FURTHER ORDERED, that the District Council's findings and conclusions in the first Order of Denial, filed September 25, 2003, are hereby READOPTED; and it is

FURTHER ORDERED, that the District Council's denial of Application No. S.E. 4347 is hereby REAFFIRMED, for the reasons given below and the reasons given with the first Order of Denial; and it is

FURTHER ORDERED, that the Clerk transmit this Order to the Circuit Court for Prince George's County for further proceedings.

ORDERED this 8th day of November, 2004, by the following vote:

In favor: Council Members Knotts, Bland, Dean, Exum and Peters

Opposed:

Abstained:

Absent: Council Members Dernoga, Harrington and Hendershot

Vote: 5-0

COUNTY COUNCIL
OF PRINCE GEORGE'S
COUNTY, MARYLAND,
SITTING AS THE
DISTRICT COUNCIL
FOR THAT PART
OF THE MARYLAND-
WASHINGTON RE-
GIONAL DISTRICT
IN PRINCE GEORGE'S
COUNTY, MARYLAND

BY: /s/ Tony Knotts
Tony Knotts, Chairman

ATTEST:

/s/ Redis C. Floyd
Redis C. Floyd
Clerk of the Council

S.E. 4347
Exhibit A

SUPPLEMENTAL CONCLUSIONS

S1. This case is here on remand from the Circuit Court for Prince George's County. The Court asks the Council for clarification of the meaning of § 27-406(h) of the Zoning Ordinance; as applied to this application. Section 27-406(h) provides:

> When approving a Special Exception for a rubble fill, the District Council shall find that the proposed

> use is *necessary to serve the projected growth in Prince George's County.*

(Italics added.) The italicized language, added to the Zoning Ordinance on November 17, 1992, in Council Bill 85-1992, sets out the standard which all applicants must meet to obtain a special exception for a rubble fill. The Circuit Court has asked the District Council to further explain why this applicant did not satisfy § 27-406(h).

S2. The applicant argues that the terms "necessary to serve the projected growth" were explained in *Brandywine Enterprises, Inc. v. County Council,* 117 Md.App. 525, 540-41, 700 A.2d 1216 (1997), as follows:

> The zoning hearing examiner noted that the terms "need" and "necessary" were not defined by the Zoning Ordinance but, citing *Lucky Stores, Inc. v. Board of Appeals for Mont. Co.,* 270 Md. 513, 312 A.2d 758 (1973); and *American Oil Co. v. Board of Appeals for Mont. Co.,* 270 Md. 301, 310 A.2d 796 (1973), went on to state that such terms had been judicially defined to mean expedient or reasonably convenient and useful to the public. We agree with the District Council that the term "necessary" under the Zoning Ordinance means necessary rather than reasonably convenient or useful. *Lucky Stores* and *American Oil Co.* both involved the identical Montgomery County statute which defined "need" in terms of public convenience and service. *Lucky Stores,* 270 Md. at 524-25; *American Oil Co.*, 270 Md. at 308. That statute did not utilize the term "necessary." In the instant case, the technical staff and the parties all proceeded *as if the determination of need involved a determination of whether there would be an actual deficit of rubble fill capacity within the next fifteen years.* We believe that this

> is the most reasonable interpretation of the needs analysis provision. Given the flaws in the technical staff's needs analysis, the question of need was fairly debatable.

(Italics added.) The Court's statement about a 15-year capacity deficit was not part of the holding in the *Brandywine* case. The statement offers only a preliminary reading of the "necessary to serve the projected growth" requirement in § 27-406(h), at a time when the Court did not have to interpret its provisions and the parties did not argue the point. But the District Council has held in all rubble fill cases since 1997 that the "necessary to serve the projected growth" standard requires considerably more than proof of a projected future deficit in rubble fill capacity within the County.

S3. The Court's statement in the 1997 *Brandywine* decision was predicated on the state of the administrative record, not the terms of the Zoning Ordinance or argument from the parties. The Court held in effect that even if the only proof needed was a showing of future in-County deficits, the applicant had not met the standard. But in the present case, the District Council and reviewing Courts must interpret and apply the "necessary to serve the projected growth" standard to the applicant's evidence when the meaning of the standard is directly in question.

S4. The Examiner concluded that the terms "necessary to serve the projected growth" required only an analysis of "accommodation." But the Examiner's reading of § 27-406(h) essentially nullifies its requirements: a rubble fill applicant will always be able to show that its proposed operation affords some convenience and accommodation to the public, and neither staff nor opposition would be able to prove otherwise. No special exception could ever be denied on that basis, and the "necessary to

serve the projected growth" standard would be meaningless, without effect. To satisfy § 27-406(h), an applicant must prove much more than public convenience and accommodation.

S5. The Council has determined in this and in two prior rubble fill cases, S.E. 4355 (Brandywine) and S.E. 4408 (Ritchie Reclamation), that § 27-406(h) requires application of the words "necessary," "serve," and "projected growth in Prince George's County." To prove what is called for in § 27-406(h), a rubble fill applicant must address by evidence these three questions:

(1) What will projected growth in Prince George's County be, during the period of operation of your rubble fill?

(2) How will your rubble fill operation serve that projected growth?

(3) Why should the District Council conclude that your fill operation will be necessary to serve the projected growth?

These three questions, these elements of proof, are required for every application, and the Council has consistently used them in rubble fill cases.

S6. The purpose of § 27-406(h) is shown in the file of the enacting bill, CB-85-1992. The bill's agenda item summary states as follows:

> Staff explained that this legislation is intended to ensure that the rubble fills approved in Prince George's County are necessary to *serve the needs of this County, and not the needs of the entire region.* The sponsor [Mr. Wineland] added that since Federal law prohibits the County from restricting the use of privately-owned rubble fills;

> requiring a needs analysis prior to Special Exception approval will help preserve this resource and protect the citizens of the County.

(Italics added.) These same purposes are intended in this case. The proposed rubble fill is a County resource; its operation will have adverse effects in the neighborhood, as do all rubble fills; and consequently the Council requires proof that the facility will actually serve – and will be necessary to serve – the County's projected growth. This rubble fill special exception application must be denied because the applicant did not prove (and did not attempt to prove) that its proposed operations are necessary to serve the projected growth in Prince George's County.

S7. The applicant's, expert for § 27-406(h), Mr. Robert Brickner, was qualified to give opinions testimony in the field of solid waste management. He testified directly about the "necessary to serve the projected growth" standard, giving the opinion that the applicant met the test. Using staff data, Mr. Brickner concluded that under any of the likely "scenarios" (staff's analysis included a number of likely outcomes, assuming the opening and closing of other fill operations), Prince George's County would within 15 years run out of rubble fill capacity in existing land fills. The applicant argues that the Brickner opinion is all that § 27-406(h) requires.

S8. But neither the Brickner opinion nor the staff's scenarios analysis – nor the Examiner's conclusions – state and apply the § 27-406(h) standard correctly. The record includes their statements about anticipated County growth and how the growth will generate thousands of tons of rubble, but then there is no connection in the proofs, no showing how the applicant's operations will "serve" and be "necessary" to serve the growth. Mere proofs – which come from staff, not the applicant – that

rubble fills in Prince George's County will run out of capacity at some future date does not show that this proposed operation (or any other) is "necessary."

It is common knowledge and is reflected in this record that most Maryland jurisdictions, including Montgomery and Howard counties, do not have rubble fills within their boundaries but have had substantial growth for many years. The applicant's proofs are insufficient because it did not show that the projected using up of in-County rubble fill capacity will have any effect on growth, good or bad or otherwise. The "necessary" term in § 27-406(h) must require – if it means anything – a showing by the applicant how the absence of its fill operation will affect growth. If there will be none, if growth as projected will proceed in the same way with or without the applicant's rubble fill, then it cannot be said and the applicant cannot claim that the fill is "necessary" to serve projected County growth.

S9. The District Council firmly believes – and has stated in the two other § 27-406(h) cases decided since 1997, S.E. 4355 and S.E. 4408 – that a rubble fill application should not be approved unless the record shows some likely adverse effects on projected County growth without the proposed operation. That is what the language of § 27-406(h) means, as a matter of ordinary signification of the words, and that is what the legislative history indicates. Because this applicant did not prove that its operations would have any effects on projected County growth, the applicant did not meet the burden of proof imposed in § 27-406(h). Because the proofs were not submitted, the District Council was required to deny the S.E. 4347 application.